

**Objection to the Issuance of Permit Approval No. AW 4542,
Don Reiboldt, Union County, Indiana.
1999 OEA 33 (98-S-J-1995)**

OFFICIAL SHORT CITATION NAME: When referring to 1999 OEA 33, cite this case as
Reiboldt, 1999 OEA 33.

TOPICS:

confined feeding
field tile
guidance
moot
verification sampling
topographic map
waived
addendum

PRESIDING JUDGES:

Penrod, Lasley

PARTY REPRESENTATIVES:

Petitioner: Deborah Albright, Esq.
Monday Rodheffer Jones & Albright
Respondent/Permittee: Daniel McInerny, Esq., Melinda Shapiro, Esq.
Bose McKinney & Evans
IDEM: Jennifer Thompson, Esq., Margaret Felton, Esq.

ORDER ISSUED:

July 13, 1999

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

**Objection to the Issuance of Permit Approval No. AW 4542,
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STATE OF INDIANA)
) SS: BEFORE THE INDIANA OFFICE OF
COUNTY OF MARION) ENVIRONMENTAL ADJUDICATION

IN THE MATTER OF:)
)
OBJECTION TO THE ISSUANCE OF)
PERMIT APPROVAL NO. AW 4542) CAUSE NO. 98-S-J-1995
DON REIBOLDT)
UNION COUNTY, INDIANA)

FINAL ORDER AFFIRMING RECOMMENDED ORDER

This constitutes notice that on June 15, 1999, the Administrative Law Judge issued a Recommended Order in the above-captioned matter. The Chief Administrative Law Judge, as the Ultimate Authority for final decisions of the Indiana Department of Environmental Management, having received no objections hereby **AFFIRMS** the Recommended Order and incorporates it by reference herein.

You are further notified that pursuant to Indiana Code 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 13th day of July 1999.

Wayne E. Penrod,
Chief Administrative Law Judge

**Objection to the Issuance of Permit Approval No. AW 4542,
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RECOMMENDED ORDER

I. Statement of the Case:

On April 13, 1998, Petitioners filed their Petition for Administrative Review of a confined feeding permit issued to Don Reiboldt on March 25, 1998. Respondent Don Reiboldt, by counsel, filed a “Motion To Dismiss Or In The Alternative Motion For Summary Judgment” on June 4, 1998. On June 26, 1998 Respondent, the Indiana Department of Environmental Management (IDEM), filed a “Response To Permittee’s Motion To Dismiss Or In The Alternative For Summary Judgment.” A pre-hearing conference was held on August 4, 1998. Petitioners appeared by counsel, Deborah Albright, Respondent appeared by counsel, Daniel McInerny and Melinda Shapiro and the IDEM appeared by counsel, Jennifer Thompson, who was later replaced by Margaret Felton. Petitioners’ filed a “Response To Motion To Dismiss/Motion For Summary Judgment” on September 18, 1998. And on September 30, 1998, Respondent Reiboldt filed a “Reply to Response To Motion To Dismiss/Motion For Summary Judgment.” The Administrative Law Judge granted Partial Summary Judgment in favor of Respondents. A hearing on the remaining issue was held on December 11, 1998. After the hearing, the parties submitted proposed findings of fact and conclusions of law. On February 16, 1999, the Administrative Law Judge held a conference wherein Respondent Reiboldt was ordered to file additional documents. IDEM issued its comments regarding the submission on April 19, 1999 and Petitioners’ filed their comments and a “Request for Hearing on Submittal.” On May 5, 1999, Respondent filed a Reply to the Request for Hearing on Submittal, and on May 6, 1999, the Administrative Law Judge denied the Request for Hearing on Submittal.

II. Findings of Fact:

The Administrative Law Judge finds, by a preponderance of the evidence, the following facts:

1. The findings in the Order Granting Partial Summary Judgment are hereby incorporated by reference.
2. Mr. Reiboldt included in his confined feeding application a drawing indicating his belief as to the existing tile system near the proposed confined feeding facility. Mr. Reiboldt noted on the diagram that the “tile system diagram is prepared to the best of my knowledge.”¹
3. Mr. Reiboldt also indicated in his confined feeding application that he would block or divert greater than 100 feet from the proposed building any tile encountered during construction.²
4. Mr. Donald Treadway and Mr. Claton Brack provided testimony and an affidavit stating that they believed a tile existed on the Reiboldt property that was not depicted on Mr. Reiboldt’s tile system map.³

¹ Plaintiff’s Exhibit 1, p. 26.

² Plaintiff’s Exhibit 1, p. 10.

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5. IDEM approved Mr. Reiboldt's application based, in part, on the written assurance that Mr. Reiboldt would block or divert any tile encountered during construction.⁴
6. Mr. Reiboldt's application did not include any information regarding tiles that existed within 100 feet of the proposed facility.⁵
7. Mr. Reiboldt hired Mr. Wildman to excavate the area and block or divert tiles encountered within 100 feet of the proposed facility.⁶
8. Mr. Wildman used a four foot long probe to punch holes in the surface every three inches across the surface to locate certain key field tiles. He then excavated a trench to locate any tiles which might be located within 100 feet of the confinement buildings. All active tiles encountered during excavation were diverted.⁷
9. IDEM inspector, Mr. John Long, testified that IDEM does not routinely verify, through a site inspection, that tiles have been properly identified, blocked or diverted.⁸
10. On April 1, 1999, Mr. Reiboldt submitted an addendum to his permit application, which included information regarding Mr. Wildman's work and a map of the tile system as it exists today.⁹
11. IDEM reviewed Mr. Reiboldt's addendum, and on April 19, 1999 issued a letter stating that it found the information satisfactory.¹⁰
12. Petitioners were also provided with a copy of the addendum and provided comments to IDEM and Mr. Reiboldt regarding their on-going concerns with the tile system.¹¹

³ Petitioner's Response to Motion to Dismiss/Motion for Summary Judgment, Ex. 1; Hearing Transcript, Testimony of Treadway, pp. 30-31 and Hearing Transcript, Testimony of Brack, pp. 43-44.

⁴ Hearing Transcript, Testimony of Long, p. 73.

⁵ Hearing Transcript, Testimony of Long, p. 78.

⁶ Hearing Transcript, Testimony of Wildman, pp. 111-112.

⁷ Hearing Transcript, Testimony of Wildman, pp. 117-118.

⁸ Hearing Transcript, Testimony of Long, p. 75.

⁹ Reply to Petitioners' Request for Hearing on Submittal, Ex. 1.

¹⁰ *Id.* at Ex. 2.

¹¹ Petitioners Request for Hearing on Submittal, p. 1.

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13. The maps provided by Mr. Wildman at the hearing and in the addendum show that several tiles existed within 300 feet of the proposed facility but were not depicted on the field tile map Mr. Reiboldt submitted in his confined feeding application.¹²

III. Discussion:

Mr. Reiboldt maintains that he has met the statutory requirements and complied with the AW-1 Guidance document when he submitted his confined feeding application on December 11, 1997. Mr. Reiboldt also argues that since field tiles are three to four feet below the ground surface, they are not visible to the eye and cannot easily be verified. IDEM states that it is satisfied that Mr. Reiboldt met the statutory requirements for a confined feeding approval. Both parties believe that Mr. Reiboldt's commitment to block or divert any field tiles encountered during construction is enough to satisfy the statute and the AW-1 Guidance.

Petitioners, on the other hand, contend that applicants for confined feeding facilities must present IDEM with accurate information. In this case, IDEM approved the application without the benefit of the knowledge that field tiles existed beneath the facility and within 100 feet of it. Such information was not made available to IDEM until a day before the hearing. Petitioners argue that the information regarding the field tiles was materially inaccurate and incomplete. Even after Mr. Reiboldt corrected the information, Petitioners believe that there is no assurance that the tile system will function as indicated since neither IDEM nor the Petitioners had an opportunity to observe or approve the construction until after the fact.

Based on the following discussion, the permit should be upheld because Mr. Reiboldt corrected his tile map through an addendum to his permit application and, therefore, Petitioners concerns have either been addressed or are not required by the law.

A. Statutory Requirement To Locate Field Tiles

Indiana Code §13-18-10-2 requires that applicants for a confined feeding permit must locate field tiles:

- (a) Application for approval of the construction of a confined feeding operation must be made on a form provided by the department. An applicant must submit the completed application form to the department together with the following:

...

- (4) Supplemental information that the department requires, including the following:

...

- (E) Location of field tiles.

¹² Hearing Transcript, Testimony of Wildman, p. 128 and Reply to Petitioners' Request for Hearing on Submittal, Ex. 1.

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IDEM interprets the above statute as requiring applicants to depict all field tiles within 300 feet of the proposed confined feeding facilities. Mr. Reiboldt provided a field tile map in his confined feeding application that only identifies where he believes field tiles may exist. It was only after his approval that Mr. Reiboldt endeavored to actually locate the field tiles. Presumably, this is not what the statute intended. Applicants must take appropriate steps to locate field tiles before IDEM can approve the application. This case, however, presents a unique factual situation in that Mr. Reiboldt's application was complete in all other respects except for his field tile map and he was able to demonstrate that he had indeed fulfilled his promise to block or divert tiles encountered during construction. Petitioners' argument that somehow Mr. Reiboldt's efforts are not good enough because no one from IDEM confirmed that the tiles were actually diverted or destroyed carries little weight in light of the fact that IDEM inspector John Long stated it is not IDEM's policy to verify such items. Overall, addendums to applications after approval are highly disfavored, but each case must be evaluated on its own merits. Thus, while the addendum in this case is equally disfavored, it served a beneficial purpose because it addressed Petitioners concerns, made IDEM aware of a potential deficiency and the submission did not prejudice Petitioners because they had an opportunity to review it and make objections.

In addition, even though Petitioners raise three issues as reasons for reopening the hearing on this matter, those issues are moot or beyond the statutory requirements. First, Petitioners contend that Mr. Reiboldt should have submitted as-built plans for his confined feeding facilities. The sole issue in this case, however, is the location of field tiles. Thus, Petitioners failed to show how as-built plans for the facilities are relevant to the location of field tiles. Second, Petitioners requested a topographic map of the relative ground elevations near the facility. Mr. Reiboldt provided topographic maps in his original permit application.¹³ Since Petitioners did not raise an objection regarding the accuracy or validity of those maps, any objection now is waived. Third, Petitioners request that Mr. Reiboldt certify the plans he submitted and conduct verification sampling. Mr. Reiboldt did certify his application and such certification would apply to the addendum submitted on April 1, 1999.¹⁴ As for verification sampling, Petitioners provide no statutory authority to require verification sampling. If Mr. Reiboldt voluntarily conducts such tests to ensure that his tile system is working, then he is free to do so. IDEM, however, cannot require him to perform such testing. Consequently, Petitioners remaining concerns are insufficient to merit reopening the hearing in this matter or to require IDEM to reverse its approval of Mr. Reiboldt's permit application.

IV. Conclusions of Law:

Based on the foregoing Findings of Fact and Discussion, the Administrative Law Judge concludes, as a matter of law, that Don Reiboldt's application, including the addendum, conforms to the statutory requirements regarding field tile location set out in Ind. Code § 13-18-10-2 and the AW- 1 Manure Management Guidance.

¹³ Plaintiff's Exhibit 1, pp. 29 and 30.

¹⁴ Plaintiff's Exhibit 1, p. 12.

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V. Recommended Order:

The Administrative Law Judge recommends that permit approval AW4542 be **UPHELD**.

VI. Appeal Rights:

You are hereby notified that pursuant to §4-21.5-3-29, you have the right to appeal the Recommended Order of the Administrative Law Judge. In order to do so, you must object in a writing that does the following:

- (1) specifies which portions of the Recommended Order you object to;
- (2) specifies which portions of the administrative record supports the objection(s); and
- (3) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days. Objections should be sent to:

Wayne E. Penrod, Chief Administrative Law Judge
Office of Environmental Adjudication
150 West Market Street, Suite 618
Indianapolis, IN 46204

A final order disposing of the case or an order remanding the case to the administrative law judge for further proceedings shall be issued within sixty (60) days after the latter of:

- (1) the date that the order was issued under §4-21.5-3-27;
- (2) the receipt of briefs; or
- (3) the close of oral argument;

unless the period is waived or extended with the written consent of all parties or for good cause shown.

IT IS SO ORDERED in Indianapolis, Indiana this 15th day of June, 1999.

Linda C. Lasley,
Administrative Law Judge